Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EDWIN ORTIZ,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTION PRESENTED

Whether the reversal of petitioner's criminal conviction by an Illinois appellate court, which held that the evidence presented at trial was insufficient to prove guilt, and which became final under state law when the Illinois Supreme Court denied direct review, may be reopened and set aside, fourteen months later by a Supervisory Order of the Illinois Supreme Court, without violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS

Petitioner:

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. Marc Bernabei, State's
Attorney of Bureau County

Respondents:

TOM M. LYTTON, WILLIAM E. HOLDRIDGE,
KENT SLATER, MICHAEL McCUSKEY,
JOHN F. MICHELA, THOMAS J. HOMER
Judges of the Appellate Court,
Third Judicial District,

and

EDWIN ORTIZ

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ORDERS AND OPINIONS

1. Unpublished opinion of the Appellate Court of Illinois, Third Judicial District, reversing petitioner's conviction. December 12, 1995. (App. p. 1)

2. Order of the Appellate Court of Illinois, Third Judicial District, denying state's Petition for Rehearing. January 22, 1996. (App. p. 11)

3. Order of the Supreme Court of Illinois denying state's Petition for Leave to Appeal. June 5, 1996. (App. p. 17)

4. Order of Supreme Court of Illinois allowing Motion for Supervisory Order and directing the Appellate Court, Third Judicial District, to vacate its decision and order of December 12, 1995, in *People v. Ortiz*, No. 3-95-0261, and all subsequent orders in that appeal and to proceed with the appeal in a manner not inconsistent with the court's opinion in *Proctor v. Upjohn*, 175 Ill. 2d 394 (1997). August 26, 1997. (App. p. 25)

5. Order of Supreme Court of Illinois allowing Motion to File Additional Authority. (App. p. 38)

6. Order of Supreme Court of Illinois denying Motion of Edwin Ortiz to Reconsider. (App. p. 39)

STATEMENT OF THE BASIS FOR JURISDICTION OF THIS COURT

1. The Supervisory Order of the Supreme Court of Illinois was entered August 26, 1997.
2. Petitioner's Motion to Reconsider was denied September 9, 1997.
3. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS PETITION

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 9, 1994, petitioner was the driver of a tractor-trailer owned by Daniel Estrella of New Jersey. The vehicle was stopped for speeding by a state trooper in Bureau County, Illinois. The trooper asked for and obtained consent to search the vehicle. The trooper entered the trailer, climbed over the shipment of oranges, and uncovered a hidden compartment which contained approximately 100 kilograms of cocaine. Petitioner denied any knowledge of the cocaine.

Petitioner was charged with drug trafficking and pled not guilty. After a bench trial, petitioner was convicted. On April 12, 1995, he was sentenced to a term of 35 years imprisonment.

Petitioner filed a notice of appeal to the Illinois' Appellate Court, Third District. Briefs were filed and following oral argument on October 11, 1995, the case was taken under advisement. On December 7, 1995, Judge Stouder, one of the three judges who heard the case, died. On December 12, 1995, the appellate court filed an unpublished opinion authored by Judge Stouder and concurred in by Judge Holdridge. Judge Lytton filed a dissenting opinion.

The majority opinion held: "We believe that based upon the totality of the evidence, no rational trier of fact could

have found that defendant possessed knowledge of the existence of drugs beyond a reasonable doubt." (App. p. 3). The majority opinion concluded by stating: "Defendant raises other issues on appeal which we need not address since we decide today that the evidence was insufficient to support the verdict. For the foregoing reasons, the judgment of the circuit court of Bureau County is reversed." (App. p. 5).

The state filed a timely Petition for Rehearing in the appellate court. In the petition the state argued that the opinion of the appellate court was not valid because Judge Stouder had died prior to its filing. (App. p. 10) The Petition for Rehearing was denied January 22, 1996. (App. p. 11)

The state filed a timely Petition for Leave to Appeal with the Illinois Supreme Court. In the petition the state again contended that the opinion was invalid because of Judge Stouder's death. (App. p. 15) The Petition for Leave to Appeal was denied by the Illinois Supreme Court on June 5, 1996. (App. p. 17) On June 18, 1996, the mandate of the appellate court was issued and petitioner was released from custody.

On February 20, 1997, the Illinois Supreme Court issued its opinion in *Proctor v. Upjohn Company*, 175 Ill. 2d 394. This case held that a decision of an appellate court in a civil case was invalid due to the fact that one of two concurring judges had vacated his office before the opinion was filed.

On August 11, 1997, in the Illinois Supreme Court, the state filed a Motion for Leave to File Complaint seeking Original Writ of Mandamus or, in the alternative, a Motion for a Supervisory Order. (App. p. 18) These

motions were predicated solely on the holding in *Proctor v. Upjohn Company*, *supra*.

On August 25, 1997, Petitioner filed an objection to the state's motions contending that the decision in his case was *res judicata* and that any attempt to reopen his case would violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. (App. p. 21)

On August 26, 1997, the Illinois Supreme Court issued an order denying the Writ of Mandamus, but granting the Motion for a Supervisory Order. (App. p. 25) The Supervisory Order issued by the Illinois Supreme Court directed the appellate court to vacate its opinion of December 12, 1995, and all subsequent orders and proceed with the appeal in a manner not inconsistent with the court's opinion in *Proctor v. Upjohn*.

On August 28, 1997, petitioner filed a Motion to Reconsider in the Supreme Court of Illinois. (App. p. 27) On September 3, 1997, petitioner filed a Motion for Leave to File Additional Authority together with a Memorandum of Additional Authority. (App. p. 29)

In his memorandum, petitioner cited cases which established that a judgment is final under Illinois law for *res judicata* purposes when the Illinois Supreme Court denies a petition for leave to appeal. Petitioner further cited a decision of this Court which held that an unreversed decision of a reviewing court in a criminal case, holding that the evidence presented at trial was insufficient to prove defendant guilty beyond a reasonable doubt, is the functional equivalent of an acquittal for purposes of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

On September 9, 1997, the Supreme Court of Illinois granted petitioner's Motion for Leave to File Additional Authority (App. p. 38) and denied petitioner's Motion to Reconsider. (App. p. 39)

ARGUMENT

THE SUPERVISORY ORDER OF THE ILLINOIS SUPREME COURT SUBJECTS PETITIONER TO DOUBLE JEOPARDY BY VACATING A FINAL JUDGMENT WHICH HELD THAT THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO PROVE GUILT BEYOND A REASONABLE DOUBT.

The order which this petition seeks to overturn, violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution by allowing the state to employ a collateral remedy to vacate a judgment which was *res judicata* and which is the legal equivalent to an acquittal. The order of the Illinois Supreme Court is in direct conflict with *Burks v. United States*, 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978).

Petitioner was convicted in the Circuit Court of Bureau County, Illinois and sentenced to 35 years imprisonment. Petitioner appealed his conviction to the Appellate Court of Illinois, Third Judicial District. Prior to his death on December 7, 1995, Judge Stouder wrote an opinion reversing petitioner's conviction. Judge Holdridge concurred in the opinion and Judge Lytton dissented. The opinion was filed December 12, 1995.

The majority decision of the appellate court in petitioner's direct appeal held that "[N]o rational trier of fact could have found that the defendant possessed knowledge of the existence of drugs beyond a reasonable

doubt". (App. p. 3) Petitioner's conviction was reversed based on the court's finding that "[T]he evidence was insufficient to support the verdict". (App. p. 5)

In this case, the state exercised its right to request direct review of the appellate court decision when it filed a Petition for Leave to Appeal to the Illinois Supreme Court. In that petition, the state argued that the death of Judge Stouder, prior to the filing of the opinion which he had authored, rendered the appellate court's decision invalid. (App. p. 15) The Illinois Supreme Court denied the Petition for Leave to Appeal on June 5, 1996. (App. p. 17)

Under Illinois law, the denial of a petition for leave to appeal renders the judgment final. *Dillenburg v. Hellgren*, 371 Ill. 452, 21 N.E.2d 393 (1939); *U.S. ex rel. Falconer v. Lane*, 708 F. Supp. 202 (N.D. Ill. 1989); *Relph v. Board of Education*, 84 Ill.2d 436, 420 N.E.2d 147 (1981).

In *Burks v. United States,* 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978), this Court held that a reversal by a reviewing court based on the insufficiency of the evidence is equivalent to an acquittal in the trial court for double jeopardy purposes. In *Greene v. Massey*, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151 (1978), this Court held that since the prohibition against double jeopardy is fully applicable to state criminal proceedings under *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969); "We are bound to apply the standard announced in *Burks* to the case now under review". (437 U.S. at 24) The application of *Burks*, *supra*, to state criminal proceedings was underscored in *Hudson v. Louisiana*, 450 U.S. 40, 67 L.Ed.2d 30, 101 S.Ct. 70 (1981).

The Supervisory Order issued by the Illinois Supreme Court contains no findings of fact or law. The order implicitly finds that the 1995 judgment of the appellate court was a nullity. Such a finding is incorrect. The appellate court had jurisdiction over the person of petitioner and the subject matter of the appeal. If, as the *Proctor* case later held, the death of Judge Stouder prior to the formal filing of his opinion rendered the opinion invalid, that opinion was voidable, not void. When the Illinois Supreme Court denied the state's Petition for Leave to Appeal, the opinion became final for *res judicata* and double jeopardy purposes. As a final decision, the judgment of reversal could not be attacked in a collateral proceeding.

In *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L.Ed.2d 103, 101 S.Ct. 2424 (1981), this Court held that a final judgment on the merits precludes the parties from relitigating issues that were raised in that action. Justice Rehnquist in the majority opinion stated:

> As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 71 L.Ed. 1069, 47 S.Ct. 600 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same [cause of action]." We have observed that "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very

> purpose of the doctrine of *res judicata* to avert." *Reed v. Allen*, 286 U.S. 191, 201, 76 L.Ed. 1054, 52 S.Ct. 532 (1932). 452 U.S. at 398-399.

When the state persuaded the Illinois Supreme Court to enter its Supervisory Order, the effect was to allow a collateral attack on a final order which acquitted petitioner.

The Illinois Supreme Court cannot subject petitioner to a second appeal anymore than it could subject him to a second trial. In *Richardson v. United States*, 468 U.S. 317, 82 L.Ed.2d 242, 104 S.Ct. 3081 (1984), this Court stated:

> In *Burks* we held that once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause. 468 U.S. at 323.

As pointed out above, state prosecutors and state courts are bound by the constitutional prohibition against double jeopardy. *Benton v. Maryland, supra*. The reason for the absolute prohibition against twice placing a person in jeopardy for the same offense as set out in *Benton* is especially applicable to this case. The *Benton* court, citing *Green v. United States*, 355 U.S. 184, 187-188, 2 L.Ed.2d 199, 78 S.Ct. 221 (1957), stated:

> [T]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the

> possibility that even though innocent he may be found guilty. 395 U.S. at 796.

The fact that petitioner may again argue his innocence to a panel of the appellate court does not preclude seeking relief from this Court now.

In *Abney v. United States*, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1977), this Court held that an immediate appeal from an order which violates a defendant's protection against double jeopardy should be allowed. Specifically, regarding the importance of immediate review, this Court stated in *Abney*:

> Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense. 431 U.S. at 660-661.

In *Harris v. Washington*, 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971), this Court held that the jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257 to request, prior to a second trial, review of a double jeopardy claim which has been rejected by a state court.

The damage to petitioner, should he be denied immediate review by this Court, would be greater than in a case where a defendant was forced to stand trial a second

time for the same offense. The Supervisory Order of the Illinois Supreme Court, which is the subject of this writ, vacated the reversal of the petitioner's conviction, and thus reinstated his conviction.

The Supervisory Order of the Illinois Supreme Court allowed the state, by use of a collateral remedy, to vacate the reversal of petitioner's conviction which was *res judicata*. The order of the appellate court held that the evidence presented at petitioner's trial was insufficient to convict. That order had become final on direct review. The Supervisory Order vacating that judgment violates petitioner's right to be protected from double jeopardy and must be reversed.

CONCLUSION

For the reasons set out above, petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Supervisory Order of the Supreme Court of Illinois.

Respectfully submitted,

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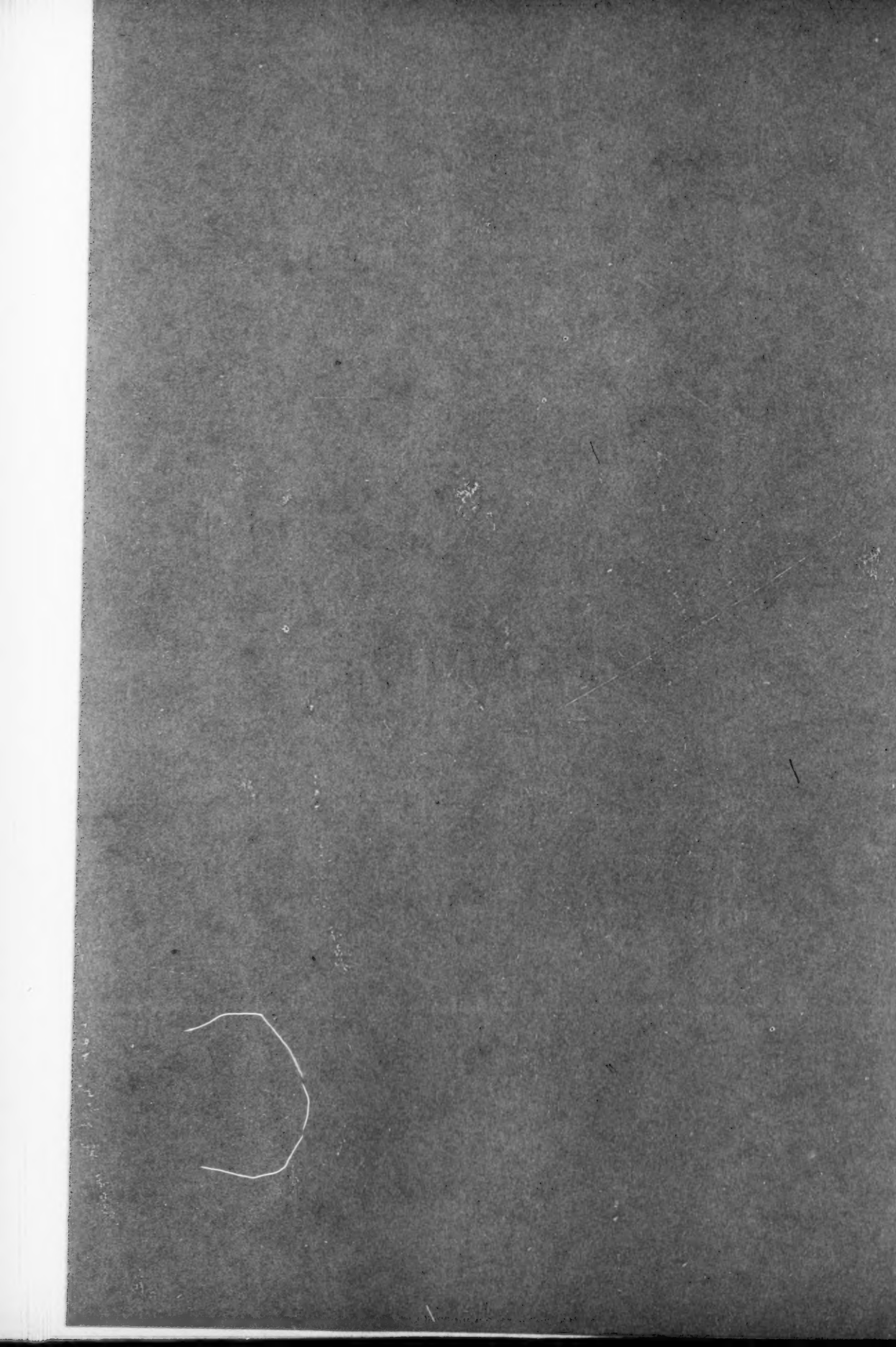
APPENDIX



App. 1

[Dated December 12, 1995]

No. 3-95-0261

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 1995

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit,
Plaintiff-Appellee,	)	Bureau County, Illinois
v.	)	No. 94-CF-68
EDWIN ORTIZ,	)	Honorable James J. Wimbiscus Judge Presiding
Defendant-Appellant.	)	

ORDER

Defendant, Edwin Ortiz (defendant), was charged by indictment with the offense of controlled substance trafficking. (720 ILCS 570/401.1 (West 1994) .) Following a bench trial, he was convicted and sentenced to imprisonment for a term of thirty-five years. Defendant appeals contending, *inter alia*, the evidence was insufficient to support the verdict. We agree and reverse.

On the morning of December 9, 1994, defendant and his girlfriend, Elena Melendez, were traveling east on I-80 in a tractor-trailer owned by Daniel Estrella of New

Jersey. The vehicle was pulled over for speeding by trooper John Balma near the Princeton exit. After issuing a warning for the speeding violation, trooper Balma requested and obtained consent to search the vehicle. Balma entered the trailer, climbed over the shipment of oranges, and uncovered a hidden compartment which contained approximately 100 kilograms of cocaine. Defendant was arrested and charged with controlled substance trafficking. Defendant denied any knowledge of the contraband.

At trial, defendant testified that for the past seventeen years he had been engaged in the trucking business as an owner-operator. He was currently employed as a driver for Daniel Estrella, whom he had met through a friend, Juan Colon. Defendant was making his second trip for Estrella when he was arrested by trooper Balma. On this particular trip, defendant and Colon were traveling from California to New Jersey in separate trucks which were loaded with oranges in California. Defendant had separated from Colon when Colon's truck broke down in Iowa. Defendant's truck was only half loaded but he testified that he did not see the truck being loaded and that he thought his cargo was simply the excess of what did not fit in Colon's truck.

The record does reveal, however, that defendant provided somewhat conflicting and inconsistent testimony regarding the facts surrounding the events which transpired, particularly with respect to the presence of his girlfriend in the truck. Further, trooper Balma testified that defendant appeared more nervous than usual for a roadside stop. Other factors elicited at trial the State argues prove knowledge include the presence of two

pagers and documentation identifying other known drug dealers found in defendant's truck.

The trial court noted this was a "close case" but found defendant guilty of controlled substance trafficking and sentenced him to thirty-five years imprisonment. Defendant's post trial motion was denied. Defendant now appeals.

To sustain a charge of controlled substance trafficking, the State was required to prove that defendant, with knowledge, brought into this State a controlled substance for the purpose of delivery or with the intent to deliver. (*People v. Frieberg* (1992), 147 Ill. 2d 326, 589 N.E.2d 508.) It is the "knowledge" requirement to which the parties direct us on appeal. The defendant contends the evidence of knowledge was insufficient to find defendant guilty beyond a reasonable doubt. The State directs us to the following factors in support of its response that the requisite knowledge existed: (1) defendant's relationship with other drug traffickers; (2) his extreme nervousness; (3) his possession of two pagers; (4) his inconsistent and suspicious testimony; and (5) the valuable nature of his shipment. Our inquiry into the matter is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Collins* (1985), 106 Ill. 2d 237, 478 N.E. 2d 267.) We believe that based upon the totality of the evidence, no rational trier of fact could have found that defendant possessed knowledge of the existence of drugs beyond a reasonable doubt.

In so holding, we are mindful of our decisions in *People v. Amaya* (1994), 255 Ill. App. 3d 967, 627 N.E.2d 753

and *People v. Sesmas* (1992), 227 Ill. App. 3d 1040, 591 N.E.2d 918, but find those cases factually distinguishable. In *Amaya*, we held the evidence supported a finding that defendant knowingly brought cocaine into this State for purpose of delivery and, thus, supported defendant's conviction for controlled substance trafficking. (*People v. Amaya* (1994), 255 Ill. App. 3d 967, 970, 627 N.E.2d 753, 756.) When asked by Sergeant Gillette if he had drugs in the truck, defendant replied, "Yes-no, I mean no." There were drugs found in the truck and in defendant's pocket. We determined it was for the jury to resolve conflicts or inconsistencies in a witness' testimony. (*Amaya*, 255 Ill. App. 3d at 970, 627 N.E.2d at 756.) Other factors critical to this court's conclusion were that defendant testified he was just a passenger along for the ride on a cross-country trip; defendant had cocaine in his pocket; and the large amount of cocaine found had a high purity level.

Further, in *Sesmas*, we held the evidence supported the conviction for trafficking in cocaine, even though defendants who were riding and driving in the vehicle professed lack of knowledge of the drug hidden in a special compartment in the gasoline tank. (*People v. Sesmas* (1992), 227 Ill. App. 3d 1040, 1050, 591 N.E.2d 918, 924.) In affirming under the *Collins* standard, we considered the following evidence critical: the greatly reduced capacity of the fuel tank would cause defendants to frequently refuel; defendants had given inconsistent answers as to who owned the vehicle when stopped; the driver had denied initially owning a gun; defendants had a pager; there was money wrapped in a baggie; and the purpose of the trip was vague.

It is true there is some overlap of factors between the above cases and the present case, namely the presence of pagers and the valuable nature of the shipment. However, the presence of pagers loses weight when viewed in the present employment setting. In fact, defendant testified one pager was his personal pager which was local to the New Jersey area and the other was Colon's which he took when the two trucks separated. Further, although we considered the valuable nature of the shipment probative of knowledge in *Amaya*, we find it equally plausible that Estrella would not tell defendant of the presence of cocaine for fear of theft. We also find any alleged relationship with known drug traffickers irrelevant to the question of knowledge. The remaining factors, nervousness and inconsistent testimony, appear at most suspicious, but do not prove knowledge. We note that the inconsistent testimony here did not involve an admission as was the case in *Amaya*. In sum, when viewing the evidence in its totality, we find it falls short of guilt beyond a reasonable doubt under the *Collins* standard.

Defendant raises other issues on appeal which we need not address since we decide today that the evidence was insufficient to support the verdict. For the foregoing reasons, the judgment of the circuit court of Bureau County is reversed.

Reversed.

STOUDER, P.J. and HOLDRIDGE, J., concur.

LYTTON, J., dissents.

App. 6

[Dated December 12, 1995]

No. 3-95-0261

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 1995

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Bureau County, Illinois
Plaintiff-Appellee,	)	
v.	)	No. 94-CF-68
EDWIN ORTIZ,	)	Honorable James J. Wimbiscus, Judge Presiding.
Defendant-Appellant.	)	

JUSTICE LYTTON, dissenting:

I respectfully dissent. When presented with a challenge to the sufficiency of evidence, this court must examine the evidence in the light most favorable to the prosecution (*People v. Sesmas* (1992), 227 Ill. App. 3d 1040, 1048, 591 N.E.2d 918, 923; *People v. Amaya* (1994), 255 Ill. App. 3d 967, 970, 627 N.E.2d 753, 756) and this court should not reverse a conviction if "any rational trier of fact could have found the essential elements beyond a reasonable doubt" (*Sesmas*, 227 Ill. App. 3d at 1048, 591 N.E. 2d at 923).

Knowledge is a question to be determined by the trier of fact. (*Sesmas*, 227 Ill. App. 3d at 1049, 591 N.E.2d at 924.) "The element of knowledge is seldom susceptible to direct proof. It may, however, be proven by evidence of acts, declarations or conduct of the accused from which the inference may be drawn that he knew of the existence of the drugs at the place they were found." *Sesmas*, 227 Ill. App. 3d at 1049, 591 N.E.2d at 924.

I believe that this court should affirm the trier of fact's determination that the defendant had knowledge of the controlled substance in his vehicle. Where controlled substances are found in an area under the defendant's control, such as a vehicle, an inference arises that the defendant has knowledge of the drugs. (Sesmas, 227 Ill. App. 3d at 1049, 591 N.E.2d at 924.) Here, the defendant even admitted looking in the truck's trailer before leaving California.

Moreover, inferences flowing from the evidence should not be disregarded. (*People v. Frieberg* (1992), 147 Ill. 2d 326, 362, 589 N.E.2d 508, 525.) The cocaine in the defendant's truck weighed more than 200 pounds, had a purity level of 76.9 percent, and was valued at more than $30,000,000.00. Even a fraction of this quantity constitutes "substantial evidence" of knowledge. (*United States v. Pollock* (11th Cir. 1991), 926 F.2d 1044, 1050 (trier of fact could reasonably conclude that no drug smuggler would entrust such a shipment to an outsider).) Several other facts support the State's contention that the defendant was a knowing participant in a drug ring: A beeper and documents found in the defendant's possession; he was traveling with another person who was conveying substantial quantities of cocaine in another truck; and defendant's demeanor at the time of the stop. (See

People v. Roberts (1994), 263 Ill. App. 3d 348, 353, 636 N.E.2d 86, 90.) Finally, while conceding that "defendant provided somewhat conflicting and inconsistent testimony," the majority fails to acknowledge that it is the trier of fact who must resolve conflicts and inconsistencies in testimony (*Amaya*, 255 Ill. App. 3d at 970, 627 N.E.2d at 756).

Based upon the evidence presented in this case, a rational trier of fact could reasonably conclude that the defendant had knowledge of the cocaine in his truck. Accordingly, I would affirm the defendant's conviction.

App. 9

No. 3-95-0261

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 13th Judicial Circuit
Plaintiff-Appellee,	)	Bureau County, Illinois
v.	)	No. 94-CF-68
EDWIN ORTIZ,	)	Honorable James Wimbiscus Judge Presiding
Defendant-Appellant.	)	

PETITION FOR REHEARING

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* * * * *

Counsel for Plaintiff-Appellee

* * * * *

ARGUMENT

SINCE THIS COURT IMPROPERLY REWEIGHED THE EVIDENCE THAT WAS PRESENTED TO THE TRIAL JUDGE AT A BENCH TRIAL, THIS COURT SHOULD GRANT A REHEARING IN THIS CAUSE.

Initially, the People point out that this court's order is erroneous because it states, ". . . we decide today that the evidence was insufficient to support the verdict." Order at 5. Since Justice Stouder passed away, he could not have participated in this court's decision on December 12, 1995, regardless of the fact that Justice Stouder and the majority of the panel may have agreed upon the order prior to December 12, 1995.

Nevertheless, the People request the appointment of a new justice to participate in the decision on this petition for rehearing. Supreme Court Rule 22(c) requires that three justices must participate in a decision and that two justices are necessary for a concurrence. Consequently, a new justice must be appointed to the present panel for a valid decision since a dissenting opinion was filed in this case.

* * * * *

[Remainder of Petition Omitted]

STATE OF ILLINOIS
THIRD DISTRICT APPELLATE COURT

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1004 Columbus Street
Ottawa, Illinois 61350

Be it remembered, That, to wit: On the 22nd day of January, 1996, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

3-95-0261

People of the State of Illinois, Appellee, v. Edwin Ortiz, Appellant.	APPEAL FROM: Bureau County Hon. James Wimbiscus 94 CF 68

Now on this day this cause coming on for hearing upon the petition for rehearing filed by the Appellee, herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is ordered by the Court that said petition for rehearing be and the same is hereby overruled and denied.

S/Gist Fleshman
Clerk of the Court

NO.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court Third District
Plaintiff-Appellee,	)	No. 3-95-0261
	)	Original Appeal from The Circuit Court of the
v.	)	13th Judicial Circuit Bureau County, Illinois
	)	No. 94-CF-68
EDWIN ORTIZ,	)	Honorable James Wimbiscus
Defendant-Appellant.	)	Judge Presiding

PETITION FOR LEAVE TO APPEAL

James Ryan
Attorney General
State of Illinois
100 West Randolph, 12th Floor
Chicago, Illinois 60601

Marc P. Bernabei
Bureau County Courthouse
700 South Main Street
Princeton, Illinois 61356
(815) 879-4941

* * * * *

Counsel for Plaintiff-Petitioner

* * * * *

PETITION FOR LEAVE TO APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ILLINOIS

PRAYER FOR LEAVE OF APPEAL

The Petitioner, the People of the State of Illinois, by James Ryan, Attorney General of the State of Illinois, and Marc P. Bernabei, State's Attorney of Bureau County, Illinois, respectfully petitions this honorable court for leave to appeal as a matter of sound judicial discretion, pursuant to Supreme Court Rules 315 and 612(b), from the judgment of the Appellate Court, Third Judicial District, which reversed the trial judge's verdict finding the defendant guilty of controlled substances trafficking.

STATEMENT REGARDING JUDGMENT, PRIOR DECISIONS, AND PETITION FOR REHEARING

The defendant, Edwin Ortiz, was charged by indictment with controlled substance (cocaine) trafficking. Following a bench trial, the defendant was found guilty. Subsequently, the defendant was sentenced to a 35-year term of imprisonment and ordered to pay a street value fine of approximately $31,000,000.

On December 12, 1995, the Appellate Court, Third District, in an unpublished order, reversed the trial judge's finding of guilty. *People v. Ortiz*, No. 3-95-0261 (3d Dist., filed December 12, 1995) (Appendix A.). The People filed a petition for rehearing, which was denied

on January 22, 1996 (Appendix B). On January 23, 1996, the People filed a notice of intent to file a petition for leave to appeal, as well as a motion to stay the mandate of the appellate court.

POINTS RELIED UPON IN SUPPORT OF PETITION FOR LEAVE TO APPEAL

I

THE APPELLATE COURT'S ORDER IS VOID BECAUSE TWO JUDGES DID NOT CONCUR IN THAT ORDER AS REQUIRED BY SUPREME COURT RULE 22(c).

II

THE DEFENDANT WAS PROVEN GUILTY BEYOND A REASONABLE DOUBT OF TRAFFICKING IN 100 KILOGRAMS OF A CONTROLLED SUBSTANCE (COCAINE).

STATEMENT OF FACTS

Although the facts outlined in the majority and dissenting opinions are generally correct, the People will present any additional facts necessary for a complete understanding of the issues in the argument portion of this petition.

ARGUMENT IN SUPPORT OF PETITION FOR LEAVE TO APPEAL

I

THE APPELLATE COURT'S ORDER IS VOID BECAUSE TWO JUDGES DID NOT CONCUR IN THAT ORDER AS REQUIRED BY SUPREME COURT RULE 22(c).

On December 12, 1995, the appellate court issued its order reversing the trial judge's verdict, which found the defendant guilty of controlled substance (cocaine) trafficking. The order stated that it was issued by Judges Stouder and Holdridge with Judge Lytton dissenting. (Appendix A) However, the appellate court's order was issued after the date of Judge Stouder's death on December 7, 1995. Consequently, Judge Stouder could not have participated in the appellate court's decision, especially when the order expressly states, "[W]e decide today that the evidence was insufficient to support the verdict." (Order at 5) The People contend that an appellate court order issued by one judge, here Judge Holdridge, is void. Supreme Court Rule 22(c) provides:

> (c) Decisions. Three judges must participate in the decision of every case, and the concurrence of two shall be necessary to a decision. One judge may decide motions of course.

In *Ciro Wrecking Company v. Roppolo*, 153 Ill.2d 6, 605 N.E.2d 544, 178 Ill. Dec. 750 (1992), this court stated that although three judges must participate in the decision of every case, the concurrence of only two judges is necessary for a decision. In *Roppolo*, one of the three judges on the panel had vacated his office before the appellate court clerk distributed the court's order. This court stated:

> Because the appellate court's judicial authority exists when two judges, a quorum, concur, and because the required participation of all three judges is not equated with that authority, it is of no consequence to the decision's validity that the appellate court clerk enters judgment after the third judge vacates office so long as he properly participated in the decision . . . here, because the order recites that Justice Coccia participated in the decision as required, the order is valid based on the concurrence of the two entered by the appellate court clerk after Justice Coccia vacated office. [605 N.E.2d at 551-52.]

Unlike *Roppolo*, the instant order is invalid because Judge Stouder could not have possibly concurred in this decision due to his death. Thus, one judge has concurred in the decision and another judge has dissented. Consequently, unlike Roppolo, the two remaining judges failed to concur, and the appellate court's order does not conform to the requirements of Supreme Court Rule 22(c). Therefore, the instant order reversing the trial judge's order is void and must be vacated by this court.

* * * * *

[Remainder of Petition Omitted]

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 5, 1996

State's Attorney App. Pros. Ottawa
Third Judicial District
628 Columbus St., S#300
Ottawa, IL 61350

No. 80620 - People State of Illinois, petitioner, v. Edwin Ortiz, respondent. Leave to appeal, Appellate Court, Third District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 27, 1996.

NO.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Marc Bernabei, State's Attorney of Bureau County, Petitioner, v. TOM M. LYTTON, WILLIAM E. HOLDRIDGE, KENT SLATER, MICHAEL McCUSKEY, JOHN F. MICHELA, THOMAS J. HOMER, Judges of the Appellate Court, Third Judicial District, Respondents, and EDWIN ORTIZ, Respondent.	)	No. 3-95-0261

MOTION FOR LEAVE TO FILE COMPLAINT SEEKING ORIGINAL WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, MOTION FOR A SUPERVISORY ORDER

Now come the People of the State of Illinois, Petitioner, by Marc P. Bernabei, State's Attorney of Bureau County, Illinois, through Judith Z. Kelly, Staff Attorney for the State's Attorney Appellate Prosecutor, Third Judicial District, and request that this court grant them leave to

file the attached complaint seeking writ of mandamus or, in the alternative, grant them leave to file a motion for supervisory order, pursuant to Supreme Court Rules 381 and 383. In support thereof, the People state as follows:

(1) Petitioner desires to obtain the issuance of a writ of mandamus, or in the alternative, a supervisory order ordering the respondent judges of the Appellate Court, Third Judicial District, to vacate the invalid opinion issued December 12, 1995, and issue a valid opinion of the appellate court in this matter concurred in by at least two sitting judges.

(2) The issue of whether the unpublished opinion in the instant case authored by Judge Stouder with the concurrence of Judge Holdridge and a dissent by Judge Lytton, issued December 12, 1995, five days after Judge Stouder's death on December 7, 1995, was a valid opinion was recently answered by this court in *Proctor v. Upjohn Company*, 175 Ill.2d 396, 677 N.E.2d 918, 222 Ill Dec. 384 (1997).

This court held that an opinion issued after one of only two concurring judges has vacated the bench is invalid.

(3) The question presented is solely one of law, to wit: Should the respondent Appellate Court, Third Judicial District, be ordered to vacate its invalid opinion issued by only one judge and decide the case anew?

(4) The People's motion filed with the appellate court seeking this relief was denied July 8, 1997.

WHEREFORE, the Petitioner requests that this honorable court grant them leave to file the attached complaint for the issuance of an original writ of mandamus compelling the Appellate Court, Third Judicial District,

to vacate the invalid opinion and decide the case anew or, in the alternative, to issue a supervisory order effecting the same relief.

Respectfully submitted,

People of the State of Illinois,
Petitioner
Mark P. Bernabei, State's Attorney
of Bureau County, Illinois

By: S/John X. Breslin
John X. Breslin
Deputy Director
Judith Z. Kelly,
Staff Attorney
State's Attorneys
Appellate Prosecutor
628 Columbus Street, Suite 300
Ottawa, Illinois 61350
(815) 434-7010

NO. 83766

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Marc Bernabei, State's Attorney of Bureau County,

Petitioner,

v.

TOM M. LYTTON, WILLIAM E. HOLDRIDGE, KENT SLATER, MICHAEL McCUSKEY, JOHN F. MICHELA, THOMAS J. HOMER, Judges of the Appellate Court, Third Judicial District,

Respondents,

and

EDWIN ORTIZ,

Respondent.

OBJECTION OF EDWIN ORTIZ TO MOTION FOR LEAVE TO FILE COMPLAINT SEEKING ORIGINAL WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, MOTION FOR A SUPERVISORY ORDER

Respondent, Edwin Ortiz by his Attorney Paul Bradley objects to the State's motions for the reasons set out below:

I. THE STATE'S MOTIONS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*.

This Court's denial of the State's Petition for Leave to Appeal on the identical issue raised here prevents the State from relitigating the question of the validity of the appellate court's decision. The appellate court issued its opinion December 12, 1995 which reversed the conviction of Edwin Ortiz. The State filed a Petition for Rehearing in the appellate court. In this petition the State argued that Judge Stouder's death prior to the filing of the opinion which he had authored, rendered the opinion invalid. The Appellate Court denied the State's petition on January 23, 1996.

The State filed a timely Petition for Leave to Appeal to this court raising the identical issue. On June 7, 1996 this court denied the Petition for Leave to Appeal. The mandate of the appellate court was issued on June 18, 1996 and Mr. Ortiz was released from custody.

This court's denial of the Petition for Leave to Appeal is *res judicata*. The instant motion is an attempt to relitigate an issue which has been finally decided.

In *Sherrer v. Sherrer*, 334 US 343 (1947) the United States Supreme Court stated that the doctrine of *res judicata* applies to a collateral attack on jurisdictional grounds. The court explained the application as follows:

> The question of what effect is to be given to an adjudication by a court that it possesses requisite jurisdiction in a case, where the judgement of that court is subsequently subjected to collateral attack on jurisdictional grounds, has been given frequent consideration by this Court over a period of many years. Insofar as cases originating in the federal

> courts are concerned, the rule has evolved that the doctrine of *res judicata* applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. The reasons for this doctrine have frequently been stated. Thus in Stoll v. Gottlieb, 305 US 165, 172, 83 L ed 104, 109, 59 S Ct 134, 38 Am Bankr NS 76 (1938), it was said: "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." (334 US At 349-50)

This court has held that the denial of a petition for leave to appeal on the merits is a final adjudication. *Weiland Tool and Manufacturing Co. v Whitney* (1969) 44 Ill. 2d 105, 251 N.E. 2d 242, 246-47.

In a criminal case the State is precluded from relitigating issues that have already been briefed, argued and decided in a prior appeal of the same case. *People v. Smith* (1st Dist 1979) 72 Ill App 3d 956, 390 N.E. 2d 1356, 1961.

II. THE STATE MAY NOT USE THE EXTRAORDINARY REMEDIES OF MANDAMUS OR SUPERVISORY POWER TO APPEAL FROM AN ADVERSE DECISION WHICH AMOUNTS TO AN ACQUITTAL IN A CRIMINAL CASE.

The decision of the appellate court directed that respondent Ortiz' conviction be reversed without remand. The only remedy available to the State under Illinois law was appeal to this court. Once the petition had been denied and the mandate issued respondent Ortiz stood acquitted of all charges.

The right to appeal by the State is limited to those circumstances set out in Illinois Supreme Court Rule 604.

The State may not use mandamus or this court's supervisory power to circumvent that rule. In this case the double jeopardy provision of the State and federal constitutions bars any further litigation of this case.

For the reasons set forth above respondent Edwin Ortiz respectfully requests that this Honorable Court enter an order denying the State's Motion for Leave to File Complaint Seeking Original Writ of Mandamus or, in the Alternative, Motion for a Supervisory Order.

Respectfully submitted,

S/Paul Bradley
Paul Bradley
Attorney for Respondent
Edwin Ortiz
343 S. Dearborn, #1510
Chicago, IL 60604
(312) 427-6050

App. 25

[Entered August 26, 1997]

No. 83766

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE ex rel. MARC BERNABEI, States's Attorney of Bureau County,	)	
Petitioner,	)	Motion for leave to file a petition for writ of mandamus or for a supervisory order
vs.	)	
HON. TOM M. LYTTON, et al.,	)	
Respondents.	)	

ORDER

This cause coming to be heard on the motion of the petitioner, due notice having been given to the respondents, and the court being fully advised in the premises;

IT IS ORDERED that the motion for leave to file a petition for writ of mandamus is *denied*. The motion for supervisory order is allowed. In the exercise of this court's supervisory authority, the Appellate Court, Third District, is directed to vacate its decision and order of December 12, 1995 in *People v. Ortiz*, No. 3-95-0261, and all subsequent orders in that appeal. The appellate court is directed to proceed with the appeal in a manner not inconsistent with this court's opinion in *Proctor v. Upjohn*, 175 Ill. 2d 396 (1997).

State of Illinois

Supreme Court

I, JULEANN HORNYAK, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof do hereby certify the foregoing to be a true copy of an order entered on August 26, 1997, in a certain cause entitled:

People ex rel. Marc Bernabei, States's Attorney of Bureau County,	)	
Petitioner	)	Mandamus
No. 83766 v.	)	
Justice of the Appellate Court, Third District, et al.,	)	
Respondents	)	

filed in this office on the 11th *day of* August A.D. 1997.

IN WITNESS WHEREOF, *I have hereunto subscribed my name and affixed the Seal of said court this* 26th *day of* August 1997.

Clerk,

Supreme Court of the State of Illinois.

NO. 83766

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Marc Bernabei, State's Attorney of Bureau County,

Petitioner,

v.

TOM M. LYTTON, WILLIAM E. HOLDRIDGE, KENT SLATER, MICHAEL McCUSKEY, JOHN F. MICHELA, THOMAS J. HOMER, Judges of the Appellate Court, Third Judicial District,

Respondents,

and

EDWIN ORTIZ,

Respondent.

EMERGENCY MOTION TO RECONSIDER

Respondent, Edwin Ortiz by his attorney Paul Bradley moves this Court to vacate its order entered August 26, 1997 granting the state's Motion for A Supervisory Order and to reconsider its decision based on respondent's Objection.

In support thereof it is stated that:

1. The state's motion was mailed on August 11, 1997 and received by respondent's attorney on August 13, 1997.

2. Respondent's attorney was unable to complete his Objection within the seven day period allowed by the rules of this Court. The issues raised by the state's motion are unique and required extensive research.

3. Respondent's attorney prepared his Objection to the state's motion with due diligence and mailed it to this Court on the evening of August 25, 1997.

4. Respondent's Objection raises substantial legal and constitutional issues which should be considered by this Court. (A copy of respondent's Objection is attached hereto.)

Wherefore respondent, Edwin Ortiz moves this Honorable Court to vacate its order entered August 26, 1997 and reconsider its decision in this case.

Respectfully submitted,

S/Paul Bradley
Paul Bradley
Attorney for Respondent
Edwin Ortiz
343 S. Dearborn, #1510
Chicago, IL 60604
(312) 427-6050

NO. 83766

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Marc Bernabei, State's Attorney of Bureau County,

Petitioner,

v.

TOM M. LYTTON, WILLIAM E. HOLDRIDGE, KENT SLATER, MICHAEL McCUSKEY, JOHN F. MICHELA, THOMAS J. HOMER, Judges of the Appellate Court, Third Judicial District,

Respondents,

and

EDWIN ORTIZ,

Respondent.

Motion For Leave To File Additional Authority In Support Of Respondent Ortiz' Motion To Reconsider

Respondent, Edwin Ortiz by his attorney Paul Bradley moves this Honorable Court to grant him leave to file additional authority in support of his Motion to Reconsider previously filed in the above captioned case.

In support thereof it is stated that:

1. Respondent Ortiz' attorney received a copy of the State's Motion for a Supervisory Order on August 13, 1997.

2. Respondent Ortiz' attorney, who is a sole practitioner, devoted as much time as possible to preparing an Objection to the State's Motion. However, because of responsibilities to other clients, counsel was unable to conduct even preliminary research and prepare his Objection until August 25, 1997 when he mailed said Objection to this Court.

3. On August 26, 1997 counsel became aware that this Court had entered a Supervisory Order directing the Appellate Court for the Third District to vacate its opinion in respondent's direct appeal. Counsel received a copy of that order on August 28, 1997.

4. On August 27, 1997 Counsel prepared and mailed to this Court a Motion to Reconsider and attached thereto his Objection to the State's original motion. Counsel is aware that this Court's Supervisory Order was entered without consideration of respondent's Objection.

5. In his Objection respondent Ortiz raised two issues:

   a. Whether, when the State had raised the issue of Judge Stouder's death, prior to the filing of the opinion on direct appeal, in its Petition for Rehearing in the Appellate Court and where that petition was denied and the State had raised the same issue before this Court in a Petition For Leave to Appeal and this Court had denied the petition was the state barred by the doctrine of *res judicata* from raising the issue again?

b. Whether, when a defendant's conviction has been reversed on the grounds that the evidence did not prove him guilty beyond a reasonable doubt and that appeal has become final may he be tried again without violating his constitutional protection against being twice put in jeopardy for the same offense?

6. Respondent Ortiz' counsel has now had time to further research these issues and has found authority in addition to that cited in his Objection.

Wherefore respondent, Edwin Ortiz, moves this Honorable Court to grant him leave to file the attached Memorandum of Law in Support of his Motion to Reconsider in the above captioned case.

Respectfully submitted,

S/Paul Bradley
Paul Bradley
Attorney for Respondent
Edwin Ortiz
343 S. Dearborn, #1510
Chicago, IL 60604
(312) 427-6050

NO. 83766

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, ex rel. Marc Bernabei, State's Attorney of Bureau County,

Petitioner,

v.

TOM M. LYTTON, WILLIAM E. HOLDRIDGE, KENT SLATER, MICHAEL McCUSKEY, JOHN F. MICHELA, THOMAS J. HOMER, Judges of the Appellate Court, Third Judicial District,

Respondents,

and

EDWIN ORTIZ,

Respondent.

Memorandum Of Additional Authority In Support Of Respondent Ortiz' Motion To Reconsider Granting of Supervisory Order

Argument

The reversal of Respondent's conviction for lack of sufficient evidence became final on June 7, 1996 when this Court denied the State's Petition for Leave to Appeal.

Respondent's case cannot now be reopened without violating the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

The majority decision of the Appellate Court in respondent's direct appeal held that "[N]o rational trier of fact could have found that defendant possessed knowledge of the existence of drugs beyond a reasonable doubt". (Opinion p.3) Respondent's conviction was reversed based on the court's finding that "[T]he evidence was insufficient to support the verdict". (Opinion p.5)

In *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d. 1 (1978), the United States Supreme Court held that a reversal by a reviewing court based on the insufficiency of the evidence is equivalent to an acquittal in the trial court for double jeopardy purposes.

State prosecutors are bound by the United States Constitution's prohibition against double jeopardy. *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d. 707 (1969). The reason for the absolute prohibition against twice placing a person in jeopardy for the same offense set out in *Benton* is especially applicable to this case. The *Benton* court citing *Green v. United States*, 355 U.S. 184, 187-88, 2 L. Ed. 2d. 199 (1957), stated:

> (T)he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. 395 US at 796.

It is respondent's contention that the reversal of his conviction based on the failure of the state to prove him guilty beyond a reasonable doubt became final for double jeopardy purposes when this Court denied the State's Petition for Leave to Appeal on June 7, 1996. That petition raised the issue of whether the opinion of the Appellate Court, which was not published until after Judge Stouder's death, was valid. That petition also raised the issue of whether the majority opinion was correct in reversing respondent's conviction based on the failure of the prosecution to prove him guilty beyond a reasonable doubt.

This Court ruled in *Dillenburg v. Hellgren*, 371 Ill. 452, 21 N.E. 2d 393 (1939) that a denial of a petition for leave to appeal by this Court renders the judgement final. Justice Wilson speaking for the court said:

> The Appellate Court, upon the appeal of Charles F and Ada F. Hellgren, decided that question adversely to the appellants, and the denial of the petition for leave to appeal from that decision rendered the decree of February 8, 1937, final as to Charles F. and Ada F. Hellgren, and if Frank V. Hellgren was in possession pendente lite or had notice the decree was also binding upon him. *A court's jurisdiction to render a particular judgment or decree having been once attacked a final adjudication of that issue precludes the raising of the question again*. (371 Ill. at 456-57). (Emphasis Added)

A denial of a petition for leave to appeal by this Court renders a conviction final for *res judicata* purposes. *US ex rel. Falconer v. Lane*, 708 F. Supp. 202 (N.D. Ill. 1989). It would be illogical to argue, as the State seems to here, that the reversal of a conviction does not also become final.

The attempt by the State to persuade this Court to apply the decision in *Proctor v. Upjohn*, 175 Ill. 2d 394, 677 N.E. 2d 918 (1997), to this case is in direct contravention to this Court's holding in *Relph v. Board of Education*, 84 Ill. 2d 436, 420 N.E. 2d 147 (1981).

In *Relph*, this Court distinguished between a final judgment which is entitled to res judicata effect and a remand order establishing the law of the case.

This Court held:

> The judgment of a court of competent jurisdiction, although it may be erroneous, is binding upon the parties until reversed and cannot be collaterally attacked. (People ex rel. First National Bank v. Russel (1918), 283 Ill. 520, 523, 119 N.E. 617.) However, before the judgment can stand as a bar to subsequent actions, under the doctrine of *res judicata* the first action must result in a final judgment on the merits. (People ex rel. Scott v. Chicago Park District (1976), 66 Ill.2d 65, 69, 4 Ill. Dec. 660, 360 N.E. 2d 773; People v. Kidd (1947), 398 Ill. 405, 408-09, 75 N.E. 2d 851.) A judgment is final if it determines the litigation on the merits so that if affirmed the only thing remaining is to proceed with the execution on the judgment. Village of Niles v. Szczesny (1958), 13 Ill.2d 45, 48, 147 N.E.2d 371. (84 Ill.2d at 441).

That the reversal of respondent's conviction cannot be attacked based on the later holding of the *Proctor* case is made clear by that portion of the *Relph* opinion which states:

> The judgments of the appellate court were not final judgments in the sense that they did not terminate the litigation but remanded the cases to the trial courts with directions that judgments be entered,

> which judgments, in turn, would be appealable to the appellate court under our constitution. The appellate court's decisions, in turn, would then be subject to review by this court through petitions for leave to appeal. (73 Ill.2d R. 315 (a).) Since the judgments in these cases were still subject to the appellate process, they were not to be given *res judicata* effect. The most that can be said of the appellate court's mandate in each case is that it established the law of the case.
>
> There is a marked distinction, however, between a final judgment which is entitled to res judicata effect and, as here, a remand order establishing the law of the case. *The former is, if entered by a court of competent jurisdiction, unassailable by any court*, while the latter is subject to change by direct review, or because during the pendency of an appeal, the highest court of the State, in a separate case, changes the applicable law which the intermediate reviewing court would be bound to apply. (84 Ill. 2d. 443-44). (Emphasis Added)

The State, in this case, appears to argue that the decision of the Appellate Court reversing respondent's conviction was void. It was not. The decision was voidable had this Court granted leave to appeal and applied the reasoning of *Proctor v. Upjohn* to this case. This Court instead denied leave to appeal. The denial of leave to appeal, while not amounting to a decision on the merits, rendered the opinion final. All that remained was the issuance of the mandate of the appellate court and the release of respondent from custody. This was done in June 1996.

The State's attempt to reopen this case by a Motion for Supervisory Order amounts to a collateral attack on a final judgment of acquittal, as such, it must be rejected.

Respectfully submitted,

S/Paul Bradley
Paul Bradley
Attorney for Respondent
Edwin Ortiz
343 S. Dearborn, #1510
Chicago, IL 60604
(312) 427-6050

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING

SPRINGFIELD 62701

September 9, 1997

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
Chicago, 60601
(312) 793-1332

Mr. Paul Bradley
Attorney at Law
343 S. Dearborn St., S#1510
Chicago, IL 60604

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 83766 - People ex rel. Marc Bernabei, State's Attorney of Bureau County, petitioner, v. Justices of the Appellate Court, Third District, et al., respondent.

Motion by respondent Edwin Ortiz for leave to cite additional authority instanter. Motion allowed.

cc: Hon. Michael P. McCuskey
State's Attorney App. Pros. Ottawa
Hon. John F. Michela
Hon. Thomas J. Homer
Hon. Tom M. Lytton
Hon. Kent Slater

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

September 9, 1997

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
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Mr. Paul Bradley
Attorney at Law
343 S. Dearborn St., S#1510
Chicago, IL 60604

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 83766 - People ex rel. Marc Bernabei, State's Attorney of Bureau County, petitioner, v. Justices of the Appellate Court, Third District, et al., respondent.

Motion by respondent Edwin Ortiz to reconsider this Court's order entered August 26, 1997, allowing petitioner's motion for a supervisory order. Motion denied.

JH/jat
cc: Hon. Michael P. McCuskey
State's Attorney App. Pros. Ottawa
Hon. John F. Michela
Hon. Thomas J. Homer
Hon. Tom M. Lytton
Hon. Kent Slater
Hon. William E. Holdridge
AG CvRyan